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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>OSCAR RAMERO DE LA CRUZ,<br><br>Defendant and Appellant. | B195515<br><br>(Los Angeles County<br>Super. Ct. No. YA062499) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark S. Arnold, Judge. Affirmed.

Susan K. Keiser, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Linda C. Johnson and Robert David Breton, Deputy Attorneys General, for Plaintiff and Respondent.

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## INTRODUCTION

Defendant Oscar Ramero De La Cruz appeals from a judgment of conviction entered after a jury trial. Defendant was charged in a single count with forcible rape (Pen. Code, § 261, subd. (a)(2))[1], and it was further alleged that he kidnapped the victim within the meaning of section 667.61, subdivisions (a) and (d). Defendant was found guilty and the kidnapping allegation was found true. Defendant filed a motion for a new trial, which was heard and denied. The trial court also denied defendant's motion to reconsider and sentenced him to state prison for 25 years to life.

On appeal, defendant contends the trial court erred in not granting his motion for new trial based upon ineffective assistance of counsel, his constitutional rights were violated by not appointing an interpreter, there was insufficient evidence to prove the kidnapping allegation, the trial court should have instructed the jury with CALJIC No. 10.65 concerning honest and reasonable belief that there was consent, trial counsel provided ineffective assistance, and cumulative error warrants reversal. We affirm the judgment.

## FACTS

### A. *Prosecution*

S.R., the victim, was 28 years old at the time of the assault. She was born deaf and mute, had cerebral palsy, seizure disorders, and was developmentally disabled and mentally delayed. She was paralyzed on her right side, could not speak any words, but only made guttural sounds. It was very hard for her to walk and she had great difficulty moving her hands. She walked with a limp, and her right arm and hand were limp.

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[1] All further statutory references are to the Penal Code, unless otherwise indicated.

S.R.'s mother, M.M., took classes on child development for the handicapped and learned American Sign Language to communicate with S.R. S.R could not read but was able to write some words, although not complete sentences. She lived with her mother since she was not able to live alone.

S.R. was friendly and communicated with people by taking out photos of herself and handing them to individuals. Whenever M.M. was present, she would translate for S.R.

S.R. was able to obtain employment at a Cheesecake Factory Restaurant, 6.77 miles from her residence. Her job was to fold cloth napkins from 9:00 a.m. to 1:00 p.m. She had worked for six years and worked five days a week under supervision of a job coach.

Initially, when S.R. obtained employment, her job coach took her to work. After S.R. qualified for handicapped transportation, she was transported by Global Access Par-Transit Services (Access). M.M. provided information about S.R.'s disabilities to the transportation company. Access had a contract with All Yellow Cab Company (Yellow Cab), and occasionally S.R. was transported by a Yellow Cab taxi or minivan.

The transportation agreement was for a vehicle to arrive at S.R.'s home at 8:00 a.m. every work day. M.M. would review a list with S.R. to help get her ready for work. The checklist was always the same. M.M. would help S.R. get dressed for work by helping her put on her panties, bra, black jeans, tennis shoes, and Cheesecake Factory shirt. S.R. would wait at the end of the driveway for her ride. The taxi driver on the day of the incident was defendant.

Defendant drove the taxi minivan 0.35 miles to a large parking lot by a shopping center, parked the minivan behind a shoe store and under a tree with hanging branches and got out. He walked around the minivan and got in the back seat with S.R. He pulled his pants off, placed a condom on his penis and forced his penis into her vagina. He removed the condom and placed it in a Kleenex tissue on the seat.

Alexi Escalante (Escalante), an employee of the grocery store in the shopping center, took a work break about 8:00 a.m. and had a view of the assault from 55 feet

away. He saw S.R. struggle with defendant. After the assault, he observed defendant get back into the driver's seat, after which he "raced off" at a high rate of speed. Escalante testified that he was afraid to get involved during the assault.

Defendant drove S.R. to work. She did not tell anyone at the Cheesecake Factory about the assault. She returned home about 1:30 p.m. When she returned home, she was very angry. Her mother asked what was wrong and S.R. told her mother what had happened. She repeatedly signed to her mother that the "taxi man" was a "bad man." She also told her mother that she had said no.

M.M. called the police to report the incident. When the deputies arrived, M.M. acted as S.R.'s interpreter. After the interview, M.M. drove S.R. to the UCLA rape trauma center in Santa Monica. Nurse Practitioner Jordan interviewed and examined S.R. She found abrasions on the inside of both thighs that appeared to be fresh injuries, consistent with the trauma inflicted, as reported by S.R.

On August 4, 2005, S.R. was taken to the Lennox Sheriff's Station by her mother for a follow-up interview with Detective Douglas Kimura. Detective Kimura drove to the crime scene with S.R. and her mother. Detective Kimura took photographs of the location.

After S.R. returned home, she drew a picture of the individual who had assaulted her. Her mother took the picture to the Sheriff's station. Detective Kimura showed S.R. a photographic lineup and S.R. identified defendant. She also identified him at the preliminary hearing and at trial. Escalante also identified defendant from a photographic lineup, at the preliminary hearing and at trial.

John Powell, a sergeant with the Los Angeles County Sheriff's Department, did work with Global Positioning System (GPS) devices. Vehicles transporting disabled passengers are required to have GPS devices, and Sergeant Powell examined the device in defendant's cab. The GPS showed the cab at a location on the corner of Hawthorne Boulevard and Rosecrans Avenue from 8:01 a.m. until just before 8:08 a.m. After the cab left the Hawthorne and Rosecrans location, it arrived at the Cheesecake Factory at 8:34 a.m., with no stops between the two locations. Records from Yellow Cab showed

that defendant had turned the taxi meter on at 8:00 a.m., indicating the passenger had just gotten in the taxi, and then turned the taxi meter off at 8:09 a.m. (to indicate that the passenger had just gotten off the taxi).

The Access transportation logs disclosed that defendant was S.R.'s driver on January 21, 2005, February 18, 2005, and July 28, 2005, the day of the sexual assault.

**B.** ***Defense***

Defendant testified on his own behalf. He and his wife owned the Ford Windstar minivan that had a driver's seat, front passenger seat, a middle seat and a back seat. Defendant had worked for Yellow Cab for about three years and was certified to drive for Access.

Defendant indicated that he had transported S.R. before and on one trip had bought her some orange juice. He knew that S.R. was deaf and had other problems. On one occasion defendant was in a parking lot with S.R. for "five or ten minutes," and S.R. gave him a photo of herself. On one occasion, S.R. had placed her feet between the driver's seat and the front passenger seat.

Defendant testified that on another occasion, S.R. wrote down her telephone number and the following note: "Call me Monday. I see you in hotel." He showed the note to two other Yellow Cab taxi drivers but then threw it away.

On July 28, 2005, defendant picked up S.R. around 8:00 a.m. He knew the minivan was equipped with a GPS system and flipped the switch to start the meter. As he drove, he saw S.R. move from the middle seat to the back seat and start to take her pants down.

Defendant admitted that he drove to the Big Saver Store parking lot, drove behind a closed shoe store, and parked under a large overhanging tree. He admitted parking where no customers or people were walking. He decided to pull over to have S.R. put her seat belt on or move back to the middle seat.

Defendant got out of his van, opened the sliding door, got in, and closed the door. He observed S.R. playing with herself. She unzipped his trousers and wanted to have

sex. S.R. pulled him toward her, but he did resist her advances. He moved to the middle seat, masturbated without a condom and ejaculated into a blue napkin. He placed the blue napkin onto the front passenger seat. He testified that he did not have any sexual contact whatsoever with S.R.

Defendant got back into the driver's seat, turned the meter off at 8:09 a.m. and resumed driving. He claimed that he turned the meter off for the sole purpose of fooling the dispatcher into thinking he was open for another call. S.R. later gestured that she was thirsty and wanted something to drink. He stopped at a 7-Eleven store and bought her a drink. He did not have contact with her and did not kidnap her.

Defendant drove S.R. to the Cheesecake Factory and arrived there about 8:20 or 8:25 a.m. S.R. gave him the regular fare and as she got out of the taxi, she tried to hug him.

Defendant did not report the incident to Yellow Cab because he was afraid the authorities would revoke S.R.'s privileges to use Access.

**C. *Rebuttal***

Detectives Kimura and Miller interviewed defendant and the interview was videotaped and played for the jury.

Defendant admitted that he drove to the shopping center to have sex with S.R. He claimed that S.R. actually seduced him and the sexual intercourse was consensual. He did not climax inside her and masturbated until he ejaculated onto the seat. He wiped his penis with a blue napkin and placed the blue napkin on the front seat, next to the center console.

He stopped at a 7-Eleven store, bought S.R. some orange juice and dropped her off at work.

Christine Pinto, a senior criminalist with the Sheriff's Department, examined the interior of defendant's minivan. She found and preserved a semen stain on the front passenger seat and two semen stains on the floorboard in front of the back seat. Two other senior criminalists, Tiffany Kuwahara and Christina Gonzalez, analyzed the semen

stains, compared them to the DNA extracted from defendant and determined that the semen stain on the front passenger seat matched defendant's DNA.

The statistical probability that a match would be found from a general population of unrelated individuals was one in 1.7 quadrillion. The presence of defendant's semen on the front seat was consistent with his ejaculating into a condom, pulling it off, and throwing it onto the front seat.

## DISCUSSION

### A. *Ineffective Assistance of Counsel Based Upon Failure to Investigate Witnessess*

Defendant claims ineffective assistance of counsel as a result of his retained counsel's failure to investigate and present additional defense witnesses. Defendant complains that defense counsel should have located and called four of defendant's fellow cab drivers, who allegedly would have testified that when they drove S.R., she behaved in a sexually explicit and inappropriate manner.

The following is a brief summary of declarations and testimony at the hearing on the motion for new trial:

#### 1. Jose Luis Martines

In his declaration, Jose Luis Martines (Martines) stated that he had transported S.R. three times. S.R. cupped her breast with both hands "and simultaneously pulled down the shirt she was wearing and pushed up her breasts."

Martines admitted that he could not read English, he signed the declaration that was prepared by defendant's new attorney and he used defendant's brother as an interpreter. He testified that he wanted to help his friend, defendant.

Martines did identify S.R. from a six-pack as the person who pushed up her breasts in the cab. Martines said that S.R. pushed up her breasts on only one occasion and could not explain how pushing her breasts up would have exposed them through the

top of her uniform shirt. The incident with S.R. was not significant enough that Martines reported it to any supervisor or defendant's trial counsel.

The trial court was not impressed with the declaration and testimony of Martines, stating: "I'm concerned about whether the words on this piece of paper are in fact his words, or whether these are someone else's words. Like [defendant]'s brother." The court commented: "I'm not convinced [Martines] is credible," and "what he is saying is suspect to me," because "[h]is actual words [while testifying] are far different than the words in the declaration." The court further found that since Martines would have been "a completely incredible witness, then it would certainly be understandable why he would not be called."

**2. Marcus Cuellar**

Marcus Cuellar (Cuellar) signed a declaration stating that he transported "[S.]R., the complaining witness in this case," on four occasions. Cuellar identified S.R.'s photo from the six pack. On one occasion, she tried to sit in the front seat, but he made her sit in the back seat. He stated that she unbuttoned about two buttons on her blouse and put her hands in her blouse. She cupped both hands under her bra, lifted her breasts inside her bra and shook them.

At the hearing on the motion for new trial, Cuellar testified that he drove a handicapped lady to "a factory called Cheesecake" three times. The first time, she tried to sit in the front passenger seat. The second time, he looked in his rear view mirror and saw her unbutton the two top buttons of her uniform shirt, adjust her breast, stick her tongue out and lick her lips. He was not shocked because she was merely "straightening out her breast." He never reported the incident.

In Cuellar's declaration, he said that he saw the lady's bra, but at the hearing, he testified that he didn't see a bra or even know whether she was wearing one.

Even though defendant was a friend, Cuellar never contacted his trial counsel. Defendant's brother, Maynor De La Cruz (Maynor), asked Cuellar to help defendant with

a declaration. Maynor took Cuellar to the new attorney's office and translated for Cuellar. Defendant's trial counsel had never contacted Cuellar.

**3. David Luna**

In his declaration, David Luna (Luna) stated that he transported "[S.]R., the complaining witness in this case," eight times. He said that on three occasions, S.R. sat in the front passenger seat, looked at him "in a very strange way," and smiled "very flirtatiously," and when they arrived at the Cheesecake Factory restaurant, rubbed her arm against his, and then shook his hand goodbye.

At the hearing, Luna testified that on one occasion when S.R. sat in the front passenger seat, he found it unusual that she got close to him and elbowed him with her arm. When he dropped her off, she shook his hand and waved good-bye. Luna believed that S.R. flirted with him by smiling and touching his arm.

S.R. made Luna nervous, but he never reported anything to his supervisors. He found out one month after defendant's arrest that defendant had been arrested for sexually assaulting S.R. He did not contact defendant's trial counsel. Maynor contacted Luna after the guilty verdict, drove him to the new attorney's office and translated the declaration for him.

**4. Noel Lezama**

In his declaration, Noel Lezama (Lezama) stated that he transported "[S.]R., the complaining witness in this case," about 15 times. Lezama stated that on nine occasions, S.R. behaved in what he interpreted to be "a sexy way." He could see in his rear view mirror that she was cupping her hands under her breasts, boosting them up, and smiling.

At the hearing, Lezama testified that on several occasions, S.R. cupped her hands under her breasts and lifted them up. On one occasion, S.R. sat in the front passenger seat, smiled and acted "provocatively" by placing her two index fingers next to each other. This was a gesture in sign language symbolizing two people getting together.

Lezama told other cab drivers, but did not tell his supervisors or defendant's trial counsel when he found out defendant had been arrested.

**5. Maynor De La Cruz**

Maynor stated in his declaration that he took two taxi drivers, Rigoberto and Jose (he could not recall the last names), to the office of defendant's trial counsel several months before trial. Rigoberto had never seen S.R. and relayed what Luna had said to him. The other individual remarked that S.R. had done "some funny things" when he drove her.

Maynor testified at the hearing that he called Rigoberto, one of defendant's fellow taxi drivers, to find out if he knew anything about what had happened. After Luna told Rigoberto about an incident with a woman, Rigoberto told Maynor, who took Rigoberto and someone named Jose to the office of defendant's trial counsel. Jose was not Jose Luis Martines, but was a witness to the fact that S.R. "later on . . . started fixing herself up more . . . [by] wearing more makeup."

According to Maynor, he did not know Jose's last name. He also indicated that S.R. had made insinuations to Luna, but trial counsel never contacted Luna.

**6. Noelia Martinez**

Noelia Martinez (Noelia) is defendant's wife and stated in her declaration that defendant "was not a monster or a predator," but had always behaved "in a responsible and decent manner." She asked defendant's trial counsel to let her testify as a character witness, but after trial counsel told her she would let her know, "she never did."

Noelia testified at the hearing that defendant was a kind, hard working man who took care of his family. She said she would have been a character witness if trial counsel had called her. Had she been called to testify at trial, she would have been asked whether her opinion of his character would have been different if she learned about defendant's 1991 arrest for statutory rape and 1994 arrest for spousal assault.

**7. Lola McAlpin-Grant**

Lola McAlpin-Grant was defendant's trial attorney. She interviewed Noelia and made a tactical decision not to call Noelia after consulting with defendant, who agreed with the decision not to call her. Counsel was aware of defendant's rap sheet.

Attorney McAlpin-Grant testified that when Maynor brought the two cab drivers, Jose and Rigoberto, to her office, they told her they had not seen or met S.R. They were supposed to interview other taxi drivers and get back to trial counsel. They never got back to her.

Rigoberto suggested to Attorney McAlpin-Grant that she talk to Oswaldo Guido (Guido), who might be of some help. Counsel listed him as a possible witness. When Attorney McAlpin-Grant talked to Guido, he was under the influence. Attorney McAlpin-Grant asked defendant whether he felt Guido should be called as a witness, and defendant told her that he did not want to call him as a witness.

Attorney McAlpin-Grant testified that none of the four taxi drivers who provided declarations ever contacted her. She subpoenaed the records from Access of everyone who had ever driven S.R., but the records were not provided until after the trial had begun. If any taxi drivers had contacted her, she would have interviewed them to determine if they were able to provide relevant information.

The trial court denied the motion for a new trial and found that defendant had not met his burden of proving ineffective assistance of counsel. The court determined that trial counsel was not derelict in failing to call the other cab drivers because (1) they would not have been credible; (2) their testimony would not have been relevant evidence on a material issue; and (3) even if consent was an issue, and even if S.R.'s lifting her breasts could be characterized as sexual behavior, evidence of sexual conduct would have been barred by Evidence Code section 1103, subdivision (c)(1).[2]

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[2] Evidence Code section 1103, subdivision (c)(1), provides in relevant part that "opinion evidence, reputation evidence, and evidence of specific instances of the complaining witness' sexual conduct, or any of that evidence, is not admissible by the defendant in order to prove consent by the complaining witness."

The trial court further stated that whether the sex was consensual was not a material issue, since defendant testified that there was no contact. Even if consent were an issue, the trial court noted that any testimony about S.R. smiling, touching a driver's arm, or pushing her breasts up would not have been probative on the issue of whether she agreed to have sex with defendant.

When a defendant raises a claim of ineffectiveness of counsel, he must establish that his "'counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors and/or omissions, the trial would have resulted in a more favorable outcome.'" (*In re Cudjo* (1999) 20 Cal.4th 673, 687; accord, *People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.) "'"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."'" (*In re Cudjo*, *supra*, at p. 687; accord, *Strickland v. Washington* (1984) 466 U.S. 668, 686 [104 S.Ct. 2052, 80 L.Ed.2d 674].)

The selection of which evidence to present ordinarily is a tactical decision which is left to trial counsel. (*People v. Jones* (1981) 123 Cal.App.3d 83, 92; *People v. Haylock* (1980) 113 Cal.App.3d 146, 151.) In the absence of a showing as to how a decision would have resulted in a different outcome, we will not reverse based on such a decision. (*In re Avena* (1996) 12 Cal.4th 694, 721; *People v. Ledesma*, *supra*, 43 Cal.3d at pp. 217-218.)

We do not fault trial counsel's alleged failure to investigate and find witnesses that would have led to a more favorable verdict. None of the named taxi drivers ever contacted defendant's counsel even though they were aware of the charges against defendant. The subpoenaed company records did not arrive until after the trial was commenced. Jose and Rigoberto did not provide any admissible evidence or leads to admissible or relevant evidence. Trial counsel did talk to Guido, but he was not able to provide any useful information, and defendant asked that he not be called to testify.

Even assuming that the four taxi drivers, who submitted declarations and testified at the motion for a new trial had been known by defendant's counsel, their testimony would not have benefitted defendant. As the trial judge observed, the alleged taxi drivers' descriptions of S.R.'s "flirtatious" behavior was not probative to any material issue at trial. Defendant testified at trial that he never touched S.R., and they did not have sex. Based upon defendant's testimony at trial, consensual sex would not have been a material issue.

While defendant contends that the proffered testimony of the taxi drivers was admissible notwithstanding Evidence Code section 1103, the trial court properly determined that any sexual conduct displayed by S.R. was "irrelevant to whether [she] consented to sex with [defendant]."[3] A trial court's holding that evidence under Evidence Code section 1103 is inadmissible will be overturned on appeal only if the defendant can show an abuse of discretion. (*People v. Bautista* (2008) 163 Cal.App.4th 762, 782.)

The evidence against defendant was overwhelming. S.R.'s testimony was credible, corroborated by her fresh complaint to her mother and the physical evidence. The testimony of the eyewitness, Escalante, was not controverted and it corroborated the testimony of S.R. Defendant's trial testimony that he never touched S.R. was contradicted by his recorded statement shown to the jury.

We do not find that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. In addition, the proffered testimony would not have led to a different outcome. Defendant consequently was not denied the effective assistance of counsel. (*In re Avena*, *supra*, 12 Cal.4th at p. 721; *People v. Ledesma*, *supra*, 43 Cal.3d at pp. 217-218.)

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[3] Evidence is relevant only if it has a "tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.)

**B.** ***Request for Interpreter***

Defendant contends that the trial court erred when it failed to declare a mistrial when the issue of an interpreter for defendant was raised during his cross-examination. While it is clear that a defendant is entitled to the assistance of an interpreter if unable to understand English, that showing was not made in the instant case.[4]

There was no indication of a need for an interpreter or any request for an interpreter until during the cross-examination of defendant at trial. During cross-examination, the prosecutor asked defendant, "Would you like to take a break and get a Spanish interpreter? You don't need a Spanish interpreter, do you?" It was finally at this point that defendant suggested for the first time that he might need an interpreter: "Yes, because I don't want to —." The trial court interrupted the proceedings and ultimately allowed defendant to be assisted by an interpreter. It was clear that the trial court allowed an interpreter for defendant only because he claimed he needed one, but not because the court felt one was warranted.

Before trial, Detectives Kimura and Miller interviewed defendant in English. The taped interview clearly showed that defendant understood English. When defendant was taken into custody by Deputy Clotworthy, he "answered all of the relevant questions posed to him at booking in English." During all of the pretrial proceedings, including the preliminary hearing and voir dire, and during the prosecution's case-in-chief, defendant never said anything about not being able to understand or requested an interpreter.

Judge Francis J. Hourigan III was assigned defendant's case prior to it being in the trial court. Judge Hourigan completed a declaration "indicating [that] at no time while the case was in his courtroom did . . . defendant ever request an interpreter and there was considerable communication between him and . . . defendant." The trial court also took judicial notice of the following: "[S]tarting with the arraignment commencing on August

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[4] Article I, section 14 of the California Constitution in pertinent part provides: "A person unable to understand English who is charged with a crime has a right to an interpreter throughout the proceedings."

15th it wasn't until February 16th in the middle of [the prosecutor's] cross-examination of . . . defendant that an interpreter was mentioned anywhere on the record or in the minute orders or in the court file."

The prosecutor put the following on the record when the trial court was attempting to determine if an interpreter was justified: "At the appearances we've had, both the preliminary hearing . . . in Division Three, the preliminary hearing setting [conference] in Division Four, all the pretrials in Department O, including coming here to Department G for trial, various judges have asked both [trial counsel] and . . . defendant [personally], does your client need an interpreter[?] [¶] And on almost all of the eight occasions when we made court appearances, both [trial counsel] and . . . defendant had indicated no, he speaks English. [I j]ust want the record to be extremely clear when he now comes back and says, oh, I don't understand the English language."

The trial court asked defendant's counsel, "Prior to now, has he ever made a request of you to have the assistance of an interpreter?" Trial counsel replied, "I don't believe he ever formally made any requests. I did formally ask him. . . . [¶] . . . [¶] At the time, he said he speaks English."

Prior to trial, there was no indication that defendant needed an interpreter. At the hearing on his motion for a new trial, the trial court took judicial notice that defendant had not requested an interpreter during his previous court appearances.

Defendant's brother, Maynor, stated in a declaration filed in support of the new trial motion that "[i]f anyone had asked [him] whether [his] brother should have an interpreter while going to court, [he] certainly would have told them that he definitely should have an interpreter," but no one ever asked him. Maynor admitted that defendant had been in the United States since 1987.

In a written declaration attached to the motion for a new trial, defendant's wife Noelia admitted defendant spoke English. She claimed, however, that he was "not fluent" and needed an interpreter "to help him understand what [was] going on" in the "court proceedings."

During the new trial motion, defendant testified that he was not "fluent" in English, but he admitted that he understood "a lot" of "basic" English and that he spoke to trial counsel, the judges, and the bailiffs in English. Defendant's trial counsel testified that defendant spoke in English with her at all court appearances and when they conferred in lockup. When she showed him a copy of the information and the transcript of his confession, both of which were in English, he read them and never said he could not understand them. Defendant's trial counsel indicated that the first time defendant ever mentioned to anyone that he wanted an interpreter was when defendant was being cross-examined by the prosecutor.

The trial court's decision to appoint an interpreter at defendant's request, while testifying, was due to intense cross-examination by the prosecution and not defendant's inability to understand English. An interpreter is needed if a party is unable to understand and speak English sufficiently to comprehend the proceedings and to assist counsel in the conduct of the case. (*People v. Aguilar* (1984) 35 Cal.3d 785, 793.) Nothing in the record indicates that defendant did not comprehend the proceedings.

Defendant's claims of prejudice are pure speculation. The record clearly demonstrates that defendant was not "unable to consult his attorney [or] adrift in a 'babble of voices.'" (*People v. Rodriguez* (1986) 42 Cal.3d 1005, 1014.) Defendant was not deprived of his right to an interpreter.

**C. *Kidnapping Special Circumstance Finding***

Defendant contends that there was insufficient evidence to support the true finding that he kidnapped S.R. We disagree. If a finding of transportation to support kidnapping with intent to commit rape is supported by substantial evidence, it may not be disturbed on appeal. Substantial evidence is responsible, credible, and of solid value such that a reasonable jury could find defendant guilty beyond a reasonable doubt. (*People v. Salazar* (1995) 33 Cal.App.4th 341, 346.)

The one-strike provisions of section 667.61, subdivisions (a) and (d)(2), apply when the defendant is convicted of an enumerated offense, including rape, and is shown

to have kidnapped the victim, with movement that "substantially increased the risk of harm to the victim over and above that level of risk necessarily inherent in the underlying offense." (§ 667.61, subd. (d)(2).) Kidnapping within the meaning of section 667.61, subdivision (d)(2), "requires movement of the victim that is more than incidental to the underlying sex offense." (*People v. Diaz* (2000) 78 Cal.App.4th 243, 246.)

Kidnapping for rape thus requires movement of the victim (1) that is not merely incidental to the commission of the rape, and (2) that increases the risk of harm over and above that necessarily present in a "standstill" rape committed without moving the victim. (*People v. Martinez* (1999) 20 Cal.4th 225, 232; *People v. Rayford*, *supra*, 9 Cal.4th at p. 12.)

Virtually any movement of the victim to a different environment constitutes sufficient transportation. (*People v. Washington* (2005) 127 Cal.App.4th 290, 302; *People v. Shadden* (2001) 93 Cal.App.4th 164, 169 [whenever the defendant moves the victim to another place, "the jury may reasonably infer that the movement was neither part of nor necessary to the rape"].) When viewed in the light most favorable to the verdict, the evidence here shows that while S.R. entered defendant's cab voluntarily on her way to work, defendant diverted from the designated route and took S.R., against her will, to the parking lot behind the shopping center at 8:00 a.m. The shopping center had 15 stores, but only the grocery store, a beauty supply store, a small laundromat, and dry cleaners were open. Defendant parked under an overhanging tree behind a shoe store that was closed in an effort to avoid detection. The movement was not merely incidental to the commission of the rape, and it certainly increased the risk of harm over and above a "standstill" rape. There thus was sufficient evidence to support the jury's finding that the kidnapping allegation was true.

**D. *Failure to Instruct with CALJIC No. 10.65***

The jury was instructed regarding the elements of sexual assault and on the People's burden to prove lack of consent, but it was not requested to, and did not, give

CALJIC No. 10.65[5] regarding a defendant's mistaken belief that the victim consented to sexual intercourse. CALJIC No. 10.65 requires that there be "substantial evidence that the defendant honestly and reasonably, but mistakenly, believed that the victim consented to sexual intercourse." (*People v. Williams* (1992) 4 Cal.4th 354, 361.) Defendant contends that the trial court had a sua sponte duty to instruct the jury with CALJIC No. 10.65. We disagree.

Defendant's reliance on *People v. Mayberry* (1975) 15 Cal.3d 143 for the proposition that the trial court had a sua sponte duty to give CALJIC No. 10.65 is misplaced. The facts of the instant case do not support a sua sponte obligation to give the instruction.

In *Mayberry*, defendant requested the instruction on reasonable belief in consent, and the trial court refused. (*People v. Mayberry*, *supra*, 15 Cal.3d at p. 153.) The court held that so long as "there was some evidence 'deserving of . . . consideration'" of a reasonable belief as to consent, the instruction should have been given. (*Id*. at p. 157.)

However, where, as here, defendant does not request an instruction on reasonable belief as to consent, a sua sponte duty to give the instruction arises only when "'it appears that a defendant is relying on [the defense of mistake of fact], or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.' [Citation.]" (*People v. Romero* (1985) 171 Cal.App.3d 1149, 1156.) If there is no conduct that would lead a defendant to reasonably and in good faith believe consent existed, a *Mayberry* instruction is not required. (*People v. Williams*, *supra*, 4 Cal.4th at pp. 360-361.)

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[5] CALJIC No. 10.65 provides: "In the crime of unlawful forcible rape, criminal intent must exist at the time of the commission of the rape. [¶] There is no criminal intent if the defendant had a reasonable and good faith belief that the other person voluntarily consented to engage in sexual intercourse. Therefore, a reasonable and good faith belief that there was voluntary consent is a defense to such a charge. [¶] . . . [¶] If after a consideration of all of the evidence you have a reasonable doubt that the defendant had criminal intent at the time of the accused sexual activity, you must find him not guilty of the crime."

Reasonable belief as to consent has both a subjective and an objective component. "The subjective component asks whether the defendant honestly and in good faith, albeit mistakenly, believed that the victim consented to sexual intercourse. In order to satisfy this component, a defendant must adduce evidence of the victim's equivocal conduct on the basis of which he erroneously believed there was consent. [¶] In addition, the defendant must satisfy the objective component, which asks whether the defendant's mistake regarding consent was reasonable under the circumstances. Thus, regardless of how strongly a defendant may subjectively believe a person has consented to sexual intercourse, that belief must be formed under circumstances society will tolerate as reasonable in order for the defendant to have adduced substantial evidence giving rise to a *Mayberry* instruction." (*People v. Williams*, *supra*, 4 Cal.4th at pp. 360-361, fn. omitted.)

Defendant was not entitled to have the jury instructed pursuant to CALJIC No. 10.65 because he was not relying on the defense of consent and the instruction is not supported by substantial evidence and would have been inconsistent with defendant's theory of the case. Defendant testified that he never even touched S.R. The trial court also noted that when defendant testified at trial, he asserted that "there was no sex" and that he had "no contact with [S.R.]" Since defendant's defense was that no sexual intercourse or contact took place, CALJIC No. 10.65 was not appropriate. (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1148-1149.)

Even disregarding defendant's testimony at trial, his contradictory version of what happened given to law enforcement does not support the instruction. His statement to Detectives Kimura and Miller was that S.R. was the aggressor and he was seduced by her. The statement did not contain any evidence of any equivocal behavior by S.R. on the question of consent. A *Mayberry* instruction is not warranted when defendant's statement to law enforcement was that the parties took part in consensual intercourse. (*People v. Williams*, *supra*, 4 Cal.4th at p. 362.)

Since there was no evidence defendant relied on a mistake-of-fact defense or any substantial evidence to support the defense, the trial court did not err in failing to instruct

the jury, sua sponte, with the *Mayberry* instruction. (*People v. Maury* (2003) 30 Cal.4th 342, 424.)

**E. *Ineffective Assistance of Counsel***

Defendant asserts four specific deficiencies of his trial counsel: (1) failure to investigate potential defense witnesses; (2) failure to request an interpreter; (3) failure to object to opinion testimony given by the sexual assault examiner; and (4) failure to object to prosecutorial misconduct. Since we have found no ineffectiveness of counsel in the investigation of defense witnesses and determined that the defendant was not entitled to an interpreter, we will address the two remaining ineffective assistance of counsel arguments.

**1. Opinion from Sexual Assault Nurse**

Defendant asserts that he was denied effective assistance of counsel by virtue of trial counsel's failure to object to inadmissible opinion from the sexual assault nurse examiner as to the cause of S.R's injuries. We disagree.

"A witness is qualified to testify as an expert if the witness has special knowledge, skill, experience, or education pertaining to the matter on which the testimony is offered. (Evid. Code, § 720.)" (*People v. Mendoza* (2000) 24 Cal.4th 130, 177.) Expert opinion testimony is admissible if the subject matter of the testimony is "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a); *People v. Gardeley* (1996) 14 Cal.4th 605, 617.)

The trial court's determination that a witness qualifies as an expert and the decision to admit expert testimony are within the discretion of the trial court and will not be disturbed without a showing of manifest abuse. (*People v. Mendoza*, *supra*, 24 Cal.4th at p. 177). "Error regarding a witness's qualifications as an expert will be found only if the evidence shows that the witness '"'*clearly lacks* qualification as an expert.'"'" (*People v. Farnam* (2002) 28 Cal.4th 107, 162.)

At the trial, Misha Jordan (Jordan), a nurse practitioner and member of the Sexual Assault Response Team, testified that she had been a women's health nurse practitioner since 1996, having graduated as a nurse in 1994 and as a nurse practitioner in 1996 from the UCLA-Harbor Nurse Practitioner Program and the California Medical Training Residency Program on Sexual Assaults. She testified that she had conducted hundreds of sexual assault examinations as a nurse practitioner. Based upon her training and experience, she was qualified as an expert in the area of sexual assault.

Defendant contends that Jordan rendered an expert opinion as to causation. The record does not support defendant's contention. Defendant's reliance on *People v. Williams* (1992) 3 Cal.App.4th 1326 is misplaced. In *Williams*, the police officer's training and experience qualified him to administer a nystagmus test and to observe eye movement, but not to attribute the eye movements to a particular cause. (*Id*. at pp. 1333-1334.) Unlike *Williams*, in the instant case, Jordan was not required to relate her observations to a test whose scientific basis was beyond her knowledge or expertise. What Jordan did was consistent with the holding in *Williams*.

Jordan testified that she found abrasions on the inside of S.R.'s thighs that appeared to be fresh injuries and were consistent with an assailant having put his hands on S.R.'s thighs and physically pulling apart her legs at the upper thigh. Jordan also noted that the breaking of the blood vessels at the opening of S.R.'s vagina and the redness and irritation on the hymen and between the clitoris and the urethra was consistent with the history given by S.R. Jordan testified as follows: "[S.R.] said that her assailant had put his penis in her vagina which could cause the kind of blunt force trauma that could cause that. I can tell that these injuries are from blunt force trauma but not the mechanism."

Jordan was a qualified expert. Her testimony did not amount to an unqualified opinion as to the cause of S.R.'s injuries. Trial counsel for defendant did not render ineffective assistance of counsel by failing to object to Jordan's qualifications or testimony.

**2. Prosecutorial Misconduct**

Defendant contends that he was denied effective assistance of counsel when his trial counsel failed to object to the prosecutor's comments during closing argument. We disagree.

***a. Comments about Defendant and Counsel***

The challenged portions of the prosecutor's closing argument include references to defendant as a "monster," a "predator," and an "animal." Defendant also challenges the prosecutor's comment that "all [defense counsel] does is throw a whole bunch of things out, and hopes one little piece of crap sticks to one of you."

Prosecutors are permitted to state their views fully as to what the evidence has shown and to urge whatever conclusions they deem proper during closing arguments. Prosecutors also are allowed to use colorful descriptions of criminal defendants that are reasonably warranted by the evidence. (See, e.g., *People v. Terry* (1962) 57 Cal.2d 538, 561 ["'animal'"]; *People v. Jones* (1970) 7 Cal.App.3d 358, 362 ["'animalistic tendencies'"].)

It is prosecutorial misconduct "'to imply that defense counsel has fabricated evidence or otherwise to portray defense counsel as the villain in the case. . . . Casting uncalled for aspersions on defense counsel directs attention to largely irrelevant matters and does not constitute comment on the evidence or argument as to inferences to be drawn therefrom.'" (*People v. Sandoval* (1992) 4 Cal.4th 155, 183-184.) However, while it is misconduct to imply "that defense counsel sought to deceive the jury," it is not misconduct to "urg[e] the jury not to be misled by defense evidence." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1302, fn omitted.)

The trial court rejected defendant's claim that his trial counsel provided ineffective assistance of counsel for failing to object to the prosecutor's comments and to request either a jury admonition or a mistrial based on prosecutorial misconduct. The trial court stated the following with regard to trial counsel's failure to object to the prosecutor's comments about defendant being a "monster," "animal" and predator": "I was present

when [the prosecutor] did it and I remember that [trial counsel] didn't object. I thought it pushed the envelope, but, under the circumstances, I think it was a fair comment on the evidence, considering the nature of the case. [¶] [Defendant was] alleged to have raped a deaf, mute girl who suffered from cerebral palsy, and based on that, I don't think it was an unfair comment for [the prosecutor] to make that characterization. . . . So . . . not only do I think it was permissible, but I don't think that it was ineffective assistance of counsel for [trial counsel] not objecting to it because I probably would have overruled the objection."

The prosecutor's comments were fair inferences from the evidence. The evidence showed that defendant had attacked a particularly vulnerable victim and took advantage of her disabilities.

The prosecutor did not attack defense counsel when the jury was told that it "should be offended" by the audacity of defendant's defense that it was simply a "misunderstanding." The prosecutor was simply arguing to the jury that defendant's defense was not believable and his testimony was entirely lacking in credibility.

***b. Facts not in Evidence***

Defendant asserts that he was denied effective assistance of counsel when the prosecutor argued facts not in evidence by stating defendant "got his job to prey on the vulnerable," the shopping center parking lot was "isolated," and that rape is the "most underreported crime in the nation" because the victims "don't want to come forward," only to be further victimized by accusations that it was consensual.

It is misconduct for the prosecutor to argue matters not admitted as evidence. (*People v. Benson* (1990) 52 Cal.3d 754, 794-795.) The prosecutor did not argue matters not admitted in evidence. The comment that defendant "got his job to prey on the vulnerable" was a fair inference based upon the evidence.

The comment that defendant had subjected S.R. to an increased risk of harm by driving her to a shopping center parking lot that was "isolated" is supported by the evidence. While it was a public parking lot, the prosecutor merely argued that defendant

"drove into a parking lot, and picked the one place in the parking lot that was the most isolated." This certainly was a reasonably inference based upon the evidence and certainly not a reference to any evidence outside the record.

Finally, defendant complains about the prosecutor's comment that rape was the "most underreported crime in the nation." Assuming arguendo this was prosecutorial misconduct, in that there was no statistical information presented to the jury indicating that sexual assault was the most unreported crime in the nation, defense counsel's failure to object to the comment was not ineffective assistance of counsel. Defendant is deprived of the effective assistance of counsel if counsel's performance falls below an objective standard of reasonableness and, absent counsel's act or omission, the trial would have had a different outcome. It is not reasonably probable defendant would have been acquitted had his counsel objected to this comment and the comment been stricken. Defendant therefore was not denied the effective assistance of counsel. (*In re Avena*, *supra*, 12 Cal.4th at p. 721; *People v. Ledesma*, *supra*, 43 Cal.3d at pp. 217-218.)

Moreover, the trial court instructed the jury that the attorneys' statements were not evidence and it should decide the facts based on the evidence presented in the courtroom. We presume the jury followed this instruction. (*People v. Holt* (1997) 15 Cal.4th 619, 662; *People v. Delgado* (1993) 5 Cal.4th 312, 331.)[6]

[6] Since we find no error, we need not address defendant's claim of cumulative error.

## DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED

JACKSON, J.

We concur:

PERLUSS, P. J.

WOODS, J.